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Attorney for Behavior Analysts, Inc.
a California Corporation

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2016 JUN 14 A 10:47
SUSAN Y. SOONG
CLERK, US DISTRICT COURT
NO. DIST. OF CA.

KAW

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEHAVIOR ANALYSTS, INC., a California corporation, Plaintiff,	**MISCELLANEOUS CASE NO.** CV 16 80127 MISC. **APPLICATION AND DECLARATION OF KATHERINE F. WENGER IN SUPPORT OF SUBPOENA FOR IDENTITY OF INFRINGER UNDER 17 U.S.C.A. § 512**

I, KATHERINE F. WENGER, declare:

1. I am an attorney at law duly licensed to practice before all the courts in the State of California as well as the Northern District of California, and am a partner in the law firm of Brown, Gee & Wenger, the attorneys for Behavior Analysts, Inc. ("BAI"). I have personal knowledge of the facts contained herein and if called as a witness would and could so testify.

2. BAI owns the copyright for what is commonly referred to as the ABLLS-R Protocol. A true and correct copy of the copyright registration certificate of that work is attached hereto as **Exhibit A**.

3. In May, BAI learned that, without its permission and/or consent, a copy of the ABLLS-R Protocol was being offered for download at https://slpemad.files.wordpress.com/2015/01/ablls-r-protocol.pdf (a website hosted by Automattic, Inc.) – a posting that constitutes an infringement of BAI's copyright in the ABLLS-R Protocol.

4. On June 9, 2016, pursuant to 17 U.S.C. § 512(c), BAI sent formal notice to Automattic of this copyright infringement and requested that Automattic take down/disable the offending material. BAI followed Automattic's posted procedures for doing so. Attached hereto as **Exhibit B** is a true and correct copy of the DMCA notice that BAI sent to Automattic on June 9, 2016, with followup email on June 10, 2016. BAI has asked Automattic for the name of the individual who created the website at issue but Automattic has refused to provide that name without a court order or subpoena.

5. BAI has undertaken diligent efforts to obtain the name, address and/or other identifying information about the individual who created and owns the website at issue and/or posted the material at issue, but to this date has not been a been able to locate any such information.

6. The purpose of this subpoena is to obtain the identity of an infringer/individual posting the infringing material and this information will only be used for the purpose of protecting Behavior Analysts, Inc.'s rights under Title 17 of the United States Code.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 10, 2016, at Walnut Creek, California.

KATHERINE F. WENGER

Certificate of Registration

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Register of Copyrights, United States of America

Registration Number
TX 7-581-146
Effective date of registration:
August 7, 2012

Title

Title of Work: The Assessment of Basic Language and Learning Skills, ABLLS-R Protocol

Completion/Publication

Year of Completion: 2010

Date of 1st Publication: September 30, 2010 **Nation of 1st Publication:** United States

Author

Author: Behavior Analysts, Inc.

Author Created: text, editing

Work made for hire: Yes

Citizen of: United States **Domiciled in:** United States

Copyright claimant

Copyright Claimant: Behavior Analysts, Inc.

P.O. Box 23695, Pleasant Hill, CA, CA, 94523-0695, United States

Limitation of copyright claim

Material excluded from this claim: text

Previous registration and year: TX0005773120 2003
/ 2003-07-01
TX0004029936 1995
/ 1995-04-17

New material included in claim: text, editing

Rights and Permissions

Organization Name: Brown Church & Gee LLP

Name: Katherine Wenger

Email: kwenger@bcglegal.com **Telephone:** 925-291-4455

Address: 100 Pringle
Suite 310
Walnut Creek, CA 94596 United States

EXHIBIT "A"

Registration #: TX0007581146

Service Request #: 1-805742671

0000TX00075811460202

Brown Church & Gee LLP
Katherine Wenger
100 Pringle Avenue
Suite 310
Walnut Creek, CA 94596 United States

Brown Gee & Wenger LLP

KATHERINE WENGER
KWENGER@BGWCOUNSEL.COM

June 8, 2016

Paul Sieminski,
General Counsel
Automattic, Inc.
132 Hawthorne Street
San Francisco, CA 94107
dmca@automattic.com

Mr. Sieminski:

I represent Behavior Analysts, Inc. ("BAI") and am writing you regarding the infringement of BAI's copyright in the ABLLS-R Protocol (the "Protocol"). As is evident from the ABLLS-R itself, BAI is the author of the Protocol and owns the copyright in that work. *See* Ex. A. BAI recently came across the website https://slpemad.files.wordpress.com/2015/01/ablls-r-protocol.pdf (which, as you know, is hosted by Autommatic) which makes the ABLLS-R available for downloading and copying without having obtained BAI's permission to do so. BAI has never authorized the use of the Protocol in this manner.

Therefore, through this letter BAI demands that you immediately (1) remove this material from your website and servers, (2) provide written confirmation that you have done so, (3) provide the identity (i.e. name and address) of the individual responsible for posting the material at issue, and (4) if possible, also provide a list of any and all persons who have downloaded this material (IP address can be provided if that is the only information available).

In addition, please consider this formal DMCA notification that the Protocol that is available for download on https://slpemad.files.wordpress.com/2015/01/ablls-r-protocol.pdf is infringing upon BAI's copyright. In particular, this letter is official notification under Section 512(c) of the Digital Millennium Copyright Act ("DMCA") to effect removal of the above-reported infringement. BAI requests that you immediately remove the specified posting and prevent the infringer, who is identified by its web address, from posting infringing material to your servers in the future. Please be advised that the law requires you, as a service provider, to "expeditiously remove or disable access to" the infringing material upon receiving this notice. Noncompliance may result in a loss of immunity for liability under the DMCA.

If BAI does not receive the information requested and/or is not able to verify the removal of the material from your website by June 21, 2016, it will be forced to file legal action to obtain the removal of such material and will be entitled to recover all of the attorneys' fees and costs it incurs in doing so. Should you have any questions, or wish to discuss this matter via phone, I can be reached at 925-291-4455.

Very truly yours,

BROWN, GEE & WENGER

KATHERINE WENGER

KFW/dj

Katherine Wenger

From: Katherine Wenger
Sent: Friday, June 10, 2016 11:46 AM
To: 'dmca@automattic.com'; Donna Meadors
Subject: RE: [DMCA #2696139]: Behavior Analysts, Inc.

Fenton,

While I do not agree that my letter did not comply with DMCA requirements and while we have already provided a complete DMCA notice both by letter and by submitting such a notice through the form fill out identified below, please consider the email contained herein a further DMCA takedown notice in response to your email.

1. I believe in good faith that the posting and use of the content found at https://slpemad.files.wordpress.com/2015/01/ablls-r-protocol.pdf, is not authorized by the copyright owner (Behavior Analyst, Inc.), its agent, or the law

2. The information in this further notice and the attached letter is true and correct

3. I swear under penalty of perjury, that I am a person authorized to act on the copyright owner (Behavior Analysts, Inc.)'s behalf.

Regards,
Katherine Wenger

Katherine F. Wenger
Brown Gee & Wenger LLP

Two Walnut Creek Center
East Bay. 200 Pringle Ave., Suite 400, Walnut Creek CA 94596
Main: (925) 943-5000
Direct: (925) 291-4455
Cell: (925) 300 6970
Fax: (925) 933-2100
kwenger@bgwcounsel.com

AUTOMATTIC - take down notic...

-----Original Message-----
From: Fenton - WordPress.com [mailto:dmca@automattic.com]
Sent: Friday, June 10, 2016 10:33 AM
To: Donna Meadors
Cc: Katherine Wenger
Subject: [DMCA #2696139]: Behavior Analysts, Inc.

Hi there,

As a DMCA takedown notice, the letter you have submitted is incomplete.

Specifically, you have not provided us with:

* A statement by you: (a) that you believe in good faith that the use of the content that you claim to infringe your copyright is not authorized by the copyright owner, its agent, or the law; (b) that the information in the notice is correct; and (c) that under penalty of perjury, you are either the copyright owner or a person authorized to act on their behalf.

Please respond at your convenience with a complete DMCA notice by using the following form: http://automattic.com/dmca Alternatively, please respond with the missing information described above, along with the information from your previous email to submit a complete DMCA notice.

Please note that you are required to give consideration to whether a use of material is fair before submitting a takedown notification, as a result of the decision in Lenz v. Universal: https://www.eff.org/press/releases/important-win-fair-use-dancing-baby-lawsuit

Additionally, be aware that your notice, including any contact information you have provided (address, telephone number, and email address), will be forwarded to the user who uploaded the material at issue.

Secondly, to your other requests regarding information on the users who uploaded and accessed the material: We (Automattic) take the protection of our users' private data very seriously. We consider items of information such as a user's email address or IP address to be private information.

Automattic's headquarters are in San Francisco, California. It is our policy to turn over private information only upon receipt of either (1) an order, specifically naming Automattic as a party, that has been validly issued by a United States court or (2) a subpoena that complies with Rule 45 of the Federal Rules of Civil Procedure and/or the California Discovery Act.

For legal requests from outside the United States, we ask that the request be served via a United States court or enforcement agency under the procedures of an applicable mutual assistance legal treaty.

You can read more about our legal guidelines here: https://en.support.wordpress.com/report-blogs/legal-guidelines/

All orders or subpoenas should be sent to court-orders@wordpress.com. Please note that per our policies, we will forward any legal process we receive to our users, and give them an opportunity to challenge disclosure of their personal information before we release it. We also charge an administrative fee of USD $125/hour for compliance with validly issued and served civil subpoenas and reserve the right to review and object to any legal process we receive.

Regards,
Fenton

Community Guardian | WordPress.com | Automattic